Supreme Court, U.S.
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No. 94-35

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STATE OF ALABAMA and
JAMES E. FOLSOM, Governor, State of Alabama,
Petitioners,

v.

POARCH CREEK INDIANS and
POARCH BAND OF CREEK INDIANS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is an action by the Poarch Band of Creek Indians ("Tribe"),[1] a federally recognized Indian tribe, against

[1] "Poarch Band of Creek Indians" is the Tribe's official name, and the sole name under which the complaint and all pleadings were filed for the Tribe. For reasons unknown to the Tribe, the Eleventh Circuit used the additional name "Poarch Creek Indians" in its case caption, and this has been carried over into the petitioner's caption here.

the State of Alabama and its Governor, under the Indian Gaming Regulatory Act ("IGRA" or "Act"), 25 U.S.C. § 2701 *et seq.* The suit seeks prospective injunctive relief regarding the Act's requirement of "good faith" negotiations as to tribal requests to undertake Class III gaming. 25 U.S.C. § 2710(d)(7)(A)(i).

The Eleventh Circuit held that Congress lacks the authority, under the Indian Commerce Clause, to provide for such suits against unconsenting states. *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1026-28 (11th Cir. 1994), *reprinted in* the Appendix to the State of Alabama's Petition for a Writ of Certiorari in No. 94-35 ("Al.App.") at A47-A61. It also held that the Tribe's suit against the Governor could not proceed under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). *Id.* at 1028-29, Al.App. at A61-A66.

The Eleventh Circuit's holding rendered inapplicable, absent state consent, the portions of IGRA providing federal courts with jurisdiction over good faith actions. *Id.* at 1029, Al.App. at A66 (citing 25 U.S.C. § 2710(d)(7)(A)(i) and (B)(i)-(vi)). While the Eleventh Circuit's holding stripped the judicial remedy from IGRA (as applied to unconsenting states), the Court's opinion indicates that tribes may, in the circumstances of this case, seek regulations from the Secretary of Interior to undertake Class III gaming. *Id.* at 1029, Al.App. at A68. The Secretary has not, however, issued any such regulations.

We incorporate by reference the more detailed Statement of the Case contained in the cross-petition of the Poarch Band of Creek Indians, filed simultaneously with this Opposition.

REASONS FOR DENYING THE WRIT

The Eleventh Circuit dismissed the action against the State, holding that Congress lacks the power, under the Indian Commerce Clause, to abrogate state Eleventh Amendment immunity to authorize suits by tribes against states regarding "good faith" negotiations under IGRA. *Id.* at 1026-28, Al.App. at A47-A61. The Eleventh Circuit also dismissed the Tribe's action against the Governor, holding that the action to require compliance with IGRA's mandate of good faith negotiations regarding Class III gaming could not proceed under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). *Id.* at 1028-29, Al.App. at A61-A66. The State of Alabama and its Governor ("Alabama") do not address these issues in their petition. These issues are presented in the Tribe's cross-petition.[2]

Alabama secured the relief it sought in the Eleventh Circuit—affirmance of dismissal of the action on Eleventh Amendment grounds. Its petition seeks review not of the judgment of the Eleventh Circuit, but rather of language in the opinion regarding the Secretary of Interior's authority to issue gaming regulations--language that Alabama characterizes as "arguably dicta." Pet. at 11 n.4.

Alabama's petition presents no question warranting independent review by this Court. The Court should decline Alabama's invitation that this Court review language that Alabama asserts is "arguably dicta," unless the Court reviews the holding of the case by granting the Tribe's cross-petition.

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[2] Essentially the same issues as those in the Tribe's cross-petition are presented by the petition in *Seminole Tribe of Florida v. Florida*, No. 94-12, which arises from the same judgment and opinion of the Eleventh Circuit as does this case.

I. ALABAMA, WHICH SUPPORTS THE JUDGMENT OF THE ELEVENTH CIRCUIT, LACKS STANDING TO SEEK REVIEW

Alabama's petition addresses certain language in the opinion of the Eleventh Circuit, but seeks to leave the judgment intact. The judgment in the case—dismissal of the action on Eleventh Amendment grounds—provided precisely the relief sought by Alabama. Alabama continues to support the judgment, stating in its petition that "the court below correctly dismissed because it lacked jurisdiction . . . ." Pet. at 21.[3]

Having secured a favorable judgment, Alabama seeks review only of that portion of the Eleventh Circuit's opinion concerning the Secretary of Interior's authority to issue regulations for Class III gaming. But, "the successful party below has no standing" to seek review in this Court. *Public Serv. Comm'n v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939). Moreover, this Court recently reaffirmed that it " 'reviews judgments, not statements in opinions.' " *Johnson v. DeGrandy*, 62 U.S.L.W. 4755, 4757 n.5 (U.S. June 30, 1994) (quoting *California v. Rooney*, 483 U.S. 307, 311 (1987)). This Court has made clear that a party securing a judgment in its favor will not be granted review based on what that party deems to be unfavorable language in a court opinion.

> Here, the judgment of the Court of Appeal was entirely in the State's favor . . . . The Court of Appeal's use of analysis that may have been adverse to the State's long-term interests does not allow the State to claim status as a losing party for purposes of this Court's review.

California v. Rooney, 483 U.S. 307, 311 (1987). Alabama—which secured a judgment in its favor, but does

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[3] *See also* Brief of Amicus Curiae States of California *et al.* in Support of the Petition for Certiorari at 3 ("[t]he states welcome the Court of Appeals' principal holding that an unconsenting state may not be sued in federal court by an Indian tribe under IGRA . . . .").

not support certain analysis in the Eleventh Circuit's opinion—accordingly lacks standing to seek review by this Court.

II. THE ISSUES PRESENTED BY ALABAMA ARE NOT RIPE FOR REVIEW

Even if Alabama had standing here, the questions it presents are not ripe for review. Alabama's petition seeks review of the language in the Eleventh Circuit's opinion suggesting that, if requested by the tribes in the circumstances of this case, the Secretary of Interior "may prescribe regulations governing Class III gaming on the tribe's lands." *Seminole Tribe,* 11 F.3d at 1029, A1.App. at A68.

But the Secretary of Interior has not determined whether he will issue Class III gaming regulations for the Poarch Band of Creek Indians, or any other tribe. Alabama does not contend otherwise.[4] Even if the Secretary acts, he may do so in a manner favorable to Alabama. And, if the Secretary acts, and Alabama is aggrieved because it believes the Secretary has exceeded his authority under IGRA, Alabama may then seek judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* In these circumstances, where Alabama is simply speculating that there may, at some uncertain time in the future, be agency action that may, in some unspecified manner, harm its interests, the issues presented in Alabama's petition are not ripe for review. *See Franklin v. Massachusetts,* 505 U.S. ——, 120 L.Ed.2d 636, 647-48 (1992).

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[4] Alabama states merely that it is informed that the Department of Interior has taken some unspecified "preliminary steps" in this regard. Pet. at 11 n.4. Alabama does not, and cannot, allege any decision or final action on the part of the Secretary.

CONCLUSION

For the foregoing reasons, Alabama's petition presents no issue warranting independent review by this Court. If the Court denies the cross-petition of the Poarch Band of Creek Indians, Alabama's petition should accordingly be denied as well. If the Court grants the cross-petition, the Tribe does not object to the granting of Alabama's petition.

Respectfully submitted,

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